

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
May 19, 2015

v

DEVONTE ANTONIO RYMES,  
  
Defendant-Appellant.

No. 320224  
Wayne Circuit Court  
LC No. 13-003281-FH

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Before: HOEKSTRA, P.J., and SAWYER and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of armed robbery, MCL 750.529, two counts of assault with intent to commit murder (AWIM), MCL 750.83, possession of a firearm by a person convicted of a felony (felon-in-possession), MCL 750.224f, two counts of resisting or obstructing a police officer, MCL 750.81d(1), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced, as a second habitual offender, MCL 769.10, to 30 to 50 years' imprisonment for his armed robbery conviction, 30 to 50 years' imprisonment for each of his assault with intent to commit murder convictions, 5 to 7 ½ years' imprisonment for his felon-in-possession conviction, two to three years' imprisonment for each of his resisting or obstructing a police officer convictions, and two years' imprisonment for his felony-firearm conviction. For the reasons set forth in this opinion, we affirm the convictions and sentences of defendant.

I. BACKGROUND

On March 25, 2013, at approximately 11:30 p.m., Brandon Foote was walking home alone in the middle of Queen Street in Detroit, Michigan. Detroit Police Officers Johnny Fox and Joshua Christian were on patrol in the area at the time. Officer Fox was wearing a thermal black shirt and a Polo black shirt that stated "Police" on the front and back, and a black jacket with his silver police badge clipped to it. The black jacket was open so that the word "Police" on the Polo shirt would have been visible. Officer Christian was dressed similarly, except that he was wearing a black hooded sweatshirt with the word "Police" on the front and the back of the sweatshirt instead of a black jacket. The officers were driving a fully marked police car on the night of the incident.

As Foote approached the intersection of Queen and Alma, a car drove past him. He looked back twice when he heard a car door shut, but he did not see anyone, when he looked

back a third time, approximately 10 seconds after hearing the car door slam, Foote saw defendant standing behind him and pointing a gun approximately 8 to 10 inches away from him. Defendant was at least 1 ½ feet away from Foote and stated, ““You know what time it is. Run your pockets.””<sup>1</sup> Foote could see the tip of the gun, and reached into the right pocket of his jacket to hand his cell phone over to defendant. Foote intentionally tripped himself to make himself fall so that defendant would not shoot him. Foote sat down, leaned back and reached toward defendant to give him the cell phone.

During the same time period, Officers Fox and Christian were walking to their police car on Queen when they saw Foote walking in the middle of the street. A car passed them and when the vehicle stopped, defendant got out of the passenger side of the vehicle. Officer Fox saw defendant run toward Foote with his arm extended. Officer Christian saw defendant point a silver handgun at Foote. The officers believed that an armed robbery was taking place, so they proceeded toward the scene of the robbery. Officer Fox took out his gun and stated over his police radio that there was an armed robbery in the area of Alma and Queen. By this time, Foote had fallen to the ground and defendant was standing over him, Officer Fox was headed toward them on the sidewalk while Officer Christian ran southbound in the middle of Queen. As they approached defendant, Officer Christian told defendant to drop the gun or stop. Christian testified that he told defendant he and Fox were police officers. Foote testified that he heard a police officer state “Freeze, don’t shoot,” but he never heard them identify themselves as police officers, though he could tell that they were by their clothing.

As soon as defendant was given the command by the police, he began to run away while turning his body and firing a shot at Officers Christian and Fox. By this time, defendant was 15 to 19 feet away from Officer Christian. According to Officer Fox, defendant did not look at the officers before firing the gunshots, Officer Christian believed he was firing at him. The officers returned gunfire. Defendant fired a second gunshot toward the officers, which prompted Officer Christian to fire three more gunshots. Defendant then fell to the ground, having been shot by the officers in the buttocks and chest. The officers immediately secured defendant’s handgun, a .40 caliber Smith and Wesson. Forensic evidence failed to identify defendant’s DNA on the handgun, but did identify some of the bullets recovered from the scene as coming from defendant’s handgun.

Defendant was convicted and sentenced as stated above. This appeal then ensued.

## II. ANALYSIS

On appeal, defendant first argues that there was insufficient evidence to support his conviction for assault with intent to commit murder. Defendant argues that because he still had eight bullets left in his handgun when he was apprehended, he clearly lacked the intent to kill. Rather, defendant argues, he was attempting to escape from the scene.

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<sup>1</sup> Foote’s testimony as to defendant’s exact words varied at trial.

In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012). Juries, not appellate courts, hear the testimony of witnesses; therefore, we defer to the credibility assessments made by a jury. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992). “It is for the trier of fact . . . to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences.” *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). The prosecution need not negate every reasonable theory of innocence, but need only prove the elements of the crime in the face of whatever contradictory evidence is provided by the defendant. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Circumstantial evidence and the reasonable inferences that arise from that evidence can constitute satisfactory proof of the elements of the crime. We resolve all conflicts in the evidence in favor of the prosecution. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

Relevant to defendant’s convictions, the elements of AWIM, are “(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.” *Ericksen*, 288 Mich App at 195-196 (quotation marks and citation omitted). This Court reviews de novo a challenge to the sufficiency of the evidence. *People v Gaines*, 306 Mich App 289, 296; 856 NW2d 222 (2014). This Court examines the evidence in a light most favorable to the prosecution “to determine whether the trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt.” *Id.* Viewing the evidence in the light most favorable to the prosecution, it is plain that there was sufficient evidence to support defendant’s convictions and, in particular, to establish that he possessed the requisite intent to kill Officers Fox and Christian. Officers Fox and Christian saw defendant run toward Foote with his arm extended. Officer Fox began running southbound on the sidewalk and Officer Christian was running southbound in the middle of Queen. Officer Christian was two or three steps in front of Officer Fox. Officer Fox was able to see Officer Christian running on his left. Officer Christian yelled, “Police, drop the gun.” Officer Christian may have also said, “Stop.” Foote heard a police officer state, “Freeze, don’t shoot.” In response to the commands of the police officers, defendant immediately started running away, turned his body, and fired a gunshot. At the time the first shot was fired, defendant was 15 to 19 feet away from Officer Christian. According to Officer Fox, defendant fired the gunshot in the direction of himself and Officer Christian. According to Officer Christian, defendant fired directly at him. There was nothing in between Officer Christian and defendant. After the officers returned gunfire, defendant fired a second gunshot. This testimony alone was sufficient to support a finding of intent to kill since the police officers and Foote testified that defendant fired two gunshots at Officers Fox and Christian with a deadly weapon. However, there was also eyewitness testimony from the robbery victim, Foote, who testified that following the commands given to defendant by the two police officers, defendant immediately began firing gunshots toward the officers. Additionally, Foote testified that he could see that the individuals giving the commands to defendant were police officers by the way they were dressed. Furthermore, defendant fled the scene of the incident while he was firing the gunshots at the officers, which this Court has previously considered an element in establishing an intent to kill. *People v Henderson*, 306 Mich App 1, 13; 854 NW2d 234 (2014).

In arguing to the contrary on appeal, defendant maintains that he lacked the requisite intent to kill because at the time of his apprehension, he still had bullets in his handgun. Additionally, defendant argues that he was running away from the scene and did not know the whereabouts of the two officers at the time the gunshots were fired. Defendant also argues that his conviction for assault of Officer Fox with intent to murder should be vacated since Officer Fox was not near Officer Christian during the shooting. For the reasons stated above, we reject defendant's claim on appeal that there was insufficient evidence to convict him of two counts of assault with intent to murder.

Defendant next argues that the prosecutor erred when he made a remark during his closing argument that shifted the burden of proof onto defendant. Defendant also argues that the prosecutor committed misconduct when he knowingly presented false testimony. "In order to preserve an issue of prosecutorial misconduct, a defendant must contemporaneously object and request a curative instruction." *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Defendant did not contemporaneously object and request a curative instruction when the prosecutor made the remark. Defendant also did not raise the issue whether the prosecutor knowingly presented false testimony in the trial court. Therefore, this issue is unpreserved. *Bennett*, 290 Mich App at 476.

This Court reviews an unpreserved claim of prosecutorial error or misconduct for plain error affecting the defendant's substantial rights. *People v Brown*, 294 Mich App 377, 382; 811 NW2d 531 (2011). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). With regard to the last requirement, the defendant must show prejudice, meaning that the error affected the outcome of the trial proceeding. *Id.* If the defendant satisfies all three requirements, then this Court reverses the decision if "the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id.* (citation and quotation marks omitted; alteration in original). A prosecutor errs when he deprives the defendant of a fair and impartial trial. *Brown*, 294 Mich App at 382. "Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context." *Id.* at 382-383. A prosecutor may not attempt to shift the burden of proof onto the defendant by implying during his closing argument that the defendant must prove something or by commenting on the defendant's failure to present evidence. *People v Fyda*, 288 Mich App 446, 463-464; 793 NW2d 712 (2010). However, the prosecutor may state that the evidence he presented at trial is undisputed and that it was not contradicted. *Id.* at 464.

During his closing argument, the prosecutor stated:

Look at the evidence. Is there anything to contradict what Mr. Foote and the circumstantial evidence, that he had no control over, supports his testimony, his indication that he, Mr. Foote, was just trying to get home. And he was walking down Queen, saw a vehicle cross in front, heard the door of a vehicle close, and knowing because he's out at 11:30, he needs to be vigilant. On the third turnaround -- he turned around twice and saw no one. The third turnaround,

he's face-to-face, at less than arm's length distance, from Mr. Rhymes [sic], and Mr. Rhymes's [sic] got a gun on him, saying, "Run your pockets, you know what time it is."

The prosecutor's remark regarding the fact that there was nothing to contradict Foote's testimony did not constitute an attempt to shift the burden of proof onto defendant. Instead, the prosecutor's statement that there was nothing to contradict Foote's testimony merely pointed out that the evidence was undisputed. See *Fyda*, 288 Mich App at 463-464. The prosecutor did not state that defendant failed to prove something or that he failed to present a defense. Therefore, the statement did not constitute prosecutorial error, and defendant is not entitled to relief. *Fyda*, 288 Mich App at 465. Even if we were to presume prosecutorial error, defendant also fails to show how the prosecutor's statement was outcome determinative. After closing arguments, the trial court instructed the jury, "The prosecutor must prove each element of the crime beyond a reasonable doubt. The defendant is not required to prove his innocence or do anything. If you find that the prosecutor has not proven every element beyond a reasonable doubt, then you must find the defendant not guilty." The trial court also instructed the jury, "The lawyers' statements and arguments are not evidence. They are only meant to help you understand the evidence and each sides' legal theories." The jury is presumed to have followed the instructions. See *People v McDonald*, 303 Mich App 424, 437; 844 NW2d 168 (2013) ("Jurors are presumed to follow a trial court's instructions.") Therefore, even if the prosecutor did err during his closing argument, defendant fails to show how the error affected the outcome of the trial. See *Carines*, 460 Mich at 763.

Next, defendant argues he is entitled to relief because the prosecution used false testimony to convict defendant. "Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness." *People v Herndon*, 246 Mich App 371, 417; 633 NW2d 376 (2001) (citation omitted). When a conviction is obtained through the use of false testimony, a prosecutor must correct the false testimony and may not knowingly use the false testimony to obtain a criminal conviction. *Id.* "Prosecutors therefore have a constitutional obligation to report to the defendant and to the trial court whenever government witnesses lie under oath." *Id.* (citation omitted). "Failure to correct false testimony requires reversal if the false testimony could in any reasonable likelihood have affected the judgment of the jury." *People v Canter*, 197 Mich App 550, 568; 496 NW2d 336 (1992). If there is conflicting evidence presented at trial, the prosecutor commits misconduct if he attempts to conceal the conflicting testimony from the defendant. See *People v Parker*, 230 Mich App 677, 690; 584 NW2d 753 (1998).

Defendant abandons on appeal the issue whether the prosecution knowingly presented false testimony because he fails to discuss the specific instances in which the prosecution used false testimony. Defendant may not merely state his position and leave it to this Court to discover the basis for his claim. See *People v Schumacher*, 276 Mich App 165, 178; 740 NW2d 534 (2007) ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority.") (Citations and internal quotation marks omitted; alteration in original). Therefore, the issue is abandoned.

Even if defendant had not abandoned the issue, there is no indication in the record that any witness testified falsely or that the prosecution knew that a witness would testify falsely. Defendant fails to describe the specific testimony that he argues was false. In addition, neither defendant nor defense counsel argued at trial that any witness gave false testimony. Although the prosecution's witnesses gave conflicting testimony regarding certain aspects of the incident, there is no indication that the prosecutor attempted to conceal the contradictions in the testimony. See *Parker*, 230 Mich App at 690. Furthermore, even assuming that a witness gave false testimony at trial, defendant fails to show how the false testimony affected the jury's decision. See *Canter*, 197 Mich App at 568. Therefore, defendant's argument that his conviction was obtained through false testimony fails. See *Herndon*, 246 Mich App at 405.

Defendant also argues that defense counsel's failure to object to the prosecutor's remark constituted ineffective assistance. Defendant filed an *in propria persona* motion with this Court to remand to the trial court for a new trial or to conduct a *Ginther*<sup>2</sup> hearing. Defendant argued in his motion that defense counsel rendered ineffective assistance when he (1) failed to object to an argument by the prosecutor that improperly shifted the burden of proof onto the defense and highlighted the fact that defendant did not testify at trial, (2) failed to investigate whether a gunshot residue test was performed on defendant, (3) failed to investigate whether Officer Fox was framing defendant and whether there was an ongoing lawsuit against Officer Fox in an unrelated case, and (4) failed to interview exculpatory witnesses and had defendant sign a form to waive his right to call witnesses even though defendant did not understand the form. This Court denied the motion to remand on January 23, 2015.<sup>3</sup>

In order to establish ineffective assistance of counsel, "a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). Defense counsel's failure to raise a futile objection or meritless argument does not give rise to ineffective assistance. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). As stated above, the prosecutor did not commit misconduct because defendant fails to show that the prosecutor's statement regarding the fact that there was nothing to contradict Foote's testimony improperly shifted the burden of proof onto defendant. Therefore, defense counsel did not render ineffective assistance because an objection to the remark would have been futile. See *Ericksen*, 288 Mich App at 201.

Defendant next argues that the transcript from the preliminary examination proves that he did not commit armed robbery or assault with intent to commit murder. "For an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court." *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). The issue

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<sup>2</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

<sup>3</sup> See *People v Rymes*, unpublished order of the Court of Appeals, entered January 23, 2015 (Docket No. 320224).

whether defendant should have been bound over for trial on the charges of armed robbery and assault with intent to commit murder based on the testimony presented at the preliminary examination was not raised in the trial court. Therefore, the issue is unpreserved. *Metamora Water Serv, Inc*, 276 Mich App at 382. This Court reviews an unpreserved issue for plain error affecting the defendant's substantial rights. *Carines*, 460 Mich at 763. As stated above, "[t]o avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id.* With regard to the last requirement, the defendant must show prejudice, or that the error affected the outcome of the trial proceeding. *Id.* If the defendant satisfies all three requirements, then this Court reverses the decision if "the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id.* (citation and quotation marks omitted; alteration in original).

Defendant abandons the issue because he fails to state to this Court the basis for his claim or cite to legal authority to support his position. See *Schumacher*, 276 Mich App at 178. Additionally, even if we were to consider defendant's arguments, a magistrate's erroneous conclusion that sufficient evidence was presented at the preliminary examination is rendered harmless by the presentation at trial of sufficient evidence to convict. *People v Meadows*, 175 Mich App 355, 359; 437 NW2d 405 (1989). See also, *People v Libbett*, 251 Mich App 353, 357-358; 650 NW2d (2002). As previously discussed, there was sufficient evidence for the jury to find defendant guilty beyond a reasonable doubt for all crimes for which he was convicted. Accordingly, defendant is not entitled to relief.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ David H. Sawyer  
/s/ Stephen L. Borrello